

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
v.)	Case No: 05-CV-0329-GKF-SAJ
)	
TYSON FOODS, INC., et al.)	
)	
Defendants.)	

**REPORT CONCERNING THE PRODUCTION OF CERTAIN
ENVIRONMENTAL SAMPLING FIELD BOOKS**

Plaintiff, the State of Oklahoma, ex. rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA (hereinafter “the State”), respectfully submits this Report Concerning the Production of Certain Environmental Sampling Field Books:

1. On March 25, 2008, the State filed a Response to the Defendants’ Motion to Compel Production in Compliance with the Court’s Order on Data Production. Dkt. #1656. In that Response, the undersigned advised the Court that the production of all then-existing scientific data was complete and up-to-date. After a supplemental production of additional documents (not testing data) to Defendants on April 3, 2008, counsel for the State again informed the Court that production of existing scientific documents was fully updated. Dkt. #1691. Counsel for the State fully and reasonably believed these representations to be accurate at the time they were made. However, the State has since learned that counsel’s representations to the Court concerning the completeness of the production were mistaken.

2. The State's representations to the Court in this regard were based on good faith assurances from Camp, Dresser and McKee ("CDM"), an environmental consulting firm retained by the State. Aff. of Darren L. Brown, Ex. A, ¶¶ 1-4. Specifically, on March 25, 2008, CDM assured the undersigned that all pending discoverable documents in its files had been submitted to the State for production to Defendants. *Id.* at ¶ 5. At the time, CDM believed this to be true. *Id.* We now know that CDM was mistaken. *Id.* Based on new information from CDM, it now appears that, as of March 25, 2008, there were six complete 2007 field books and pages from three other 2007 field books which had inadvertently not been produced to Defendants during the normal course of discovery. *Id.* All but 16 pages of these field books were in fact produced to the Defendants on May 15, 2008 as part of the expert "considered" materials of CDM's Darren L. Brown ("Mr. Brown's"). *Id.*

3. The delay in producing these field books and field book pages was the result of simple human error. *See generally* Aff. of Darren L. Brown, Ex. A.

4. On May 15, 2008, the State produced thousands of documents to Defendants as Mr. Brown's expert witness considered materials, including the attached 2007 Bennett Field Book, 2007 Supplemental Fall Sampling Field Book, 2007 Lake Sampling Field Book, Fish Sampling 2007 Field Book, Fish Sampling 2007 Field Book (Mulcrone), IRW Fish Shocking Field Book and Intensive Sampling 2007 Field Book (pp. 1 – 70) (*See* Exs. A-1 – A-3; and A-6 – A-9). On June 9, 2008, it was brought to Mr. Brown's attention that part of the 2007 Bennett Field Book (pages 91 through 112) and the entire 2007 Supplemental Fall Sampling Field Book and 2007 Lake Sampling Field Book were not produced prior to May 15. Aff. of Darren L. Brown, Ex. A, ¶ 6. The same 2007 Supplemental Fall Sampling Field Book and 2007 Lake Sampling Field Book were also produced to Defendants on May 15 as

part of Dr. Bert Fisher's considered materials. (*See* Fisher00005583_2007 and Fisher00005615_2007). *Id.*

5. Mr. Brown was first made aware of the possibility that these field books were not previously produced when Lithochimeia, Inc. (Dr. Fisher's consulting firm) found that the 2007 Supplemental Fall Sampling Field Book and 2007 Lake Sampling Field Book had not been Bates-numbered prior to the production of considered materials on May 15. Aff. of Darren L. Brown, Ex. A, ¶ 7. Upon learning this, Mr. Brown checked his records from the same time frame and confirmed that CDM did not submit the 2007 Supplemental Fall Sampling Field Book or 2007 Lake Sampling Field Book to counsel for the State prior to delivery of expert considered materials in May 2008. *Id.* Mr. Brown also determined that the final 22 pages of the 2007 Bennett Field Book were not submitted to the State until he delivered his expert considered materials in May 2008. *Id.*¹

6. The explanation for the delay is as follows. On October 29, 2007, Brian Bennett of CDM sent electronic copies of the completed 2007 Bennett Field Book, 2007 Supplemental Fall Sampling Field Book and 2007 Lake Sampling Field Book to Mr. Brown via email. Exs. A-4 and A-5. At the time these emails were sent, Mr. Brown was at an appointment outside of his office. Aff. of Darren L. Brown, Ex. A, ¶ 8. While he did receive the October 29 emails on his PDA device, this resulted in the emails being marked as "read" on his office computer. *Id.* In the course of trying to catch up with client requests upon his return to the office, Mr. Brown simply forgot to place the field book files into a folder for

¹ The first 90 pages of the 2007 Bennett Field Book were produced to Defendants on August 7, 2007 in the normal course of discovery (STOK0025793 – 25839 (double-sided pages)).

submittal to counsel for the State. *Id.* Mr. Brown did not recognize his error until June 9, 2008 (as described above). *Id.*

7. After discovering that these field books and field book pages had not been produced during the normal course of discovery, CDM, at the request of counsel for the State, conducted an additional investigation of its files to ensure that there were not any other documents or items that were inadvertently delayed. Aff. of Darren L. Brown, Ex. A, ¶ 9. After this investigation, CDM found that the following additional field books were produced to Defendants on May 15, 2008 as part of Mr. Brown's considered materials, but were not produced earlier through the normal course of discovery:

- ▶ Fish Sampling 2007 Field Book (Ex. A-6) (pages 1 through 26)
- ▶ Fish Sampling 2007 Field Book (Mulcrone) (Ex. A-7) (pages 1 through 10)
- ▶ IRW Fish Shocking Field Book (Ex. A-8) (pages 1 through 19)
- ▶ Intensive Sampling 2007 Field Book (Ex. A-9) (pages 1 through 70)

8. CDM further determined that 16 pages from two 2007 field books were not produced on May 15, 2008. Aff. of Darren L. Brown, Ex. A, ¶¶ 10-12.

9. As explained fully in Mr. Brown's Affidavit, the cause of delay in producing these field books and field book pages was also simple human error. Aff. of Darren L. Brown, Ex. A, ¶¶ 13-16.

10. The sampling events chronicled in the attached field books and field book pages did not involve bacteria. None of these field books would have been pertinent to the issues raised during the hearing on Plaintiff's Motion for Preliminary Injunction. Aff. of Darren L. Brown, Ex. A, ¶ 17.

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I certify that on the 27th day of June, 2008, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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